STATE OF MICHIGAN

COURT OF APPEALS

LEASE ACCEPTANCE CORPORATION,

Plaintiff-Appellant,

v

VINSON ABEL,

Defendant,

and

ANDREW ASMAN, JAMES HUMENIK, ALAN B. THOMPSON, ARNOLD WILSON, JOSE DUARTE JUAN D. DUARTE, WARREN G. JAFVERT, GREG MCCUE, MAI V. HOANG, JEFF NAGY, TUAN V. VO, DAVID BRAMLET, WILLIAM WILKINSON, and ELIZABETH WILSON,

Defendants-Appellees.

UNPUBLISHED
November 20, 2008

No. 278716
Oakland Circuit Court
LC No. 2004-056034-CK

LEASE ACCEPTANCE CORPORATION,

Plaintiff-Appellant,

v

SCOTT ADAMS,

Defendant,

and

JAVIER ALCARAZ, JOSEPH P. AUBUCHON, BRIAN AUBUCHON, CHRISTOPHER BAILEY, DARLENE BALLEW, TRACIE L. BALLEW, BEVERLY BARNAY, ADAM BOYD, LEO DEMIRTSHIAN, SHAWN J. FARIA, DUANE

No. 278717
Oakland Circuit Court
LC No. 2004-056036-CK

JOHNSON, JOA MADRUGA, MARLIN BAERG, VADE A. BRADLEY, OWEN D. CHAMBERLIN, RUDY ESPARZA, STEVE LERCHE, RUTH MILLER, PHILLIP KNAUS, and JAMES BAILEY,

Defendants-Appellees.

LEASE ACCEPTANCE CORPORATION,

Plaintiff-Appellant,

v

No. 278718
Oakland Circuit Court
LC No. 2004-056026-CK

HEATHER BAKKER,

Defendant,

and

MARC BELL, JAMES RAY FACKLER, ANITA ROZZI, JAMES E. ROZZI, ENEAS O. SOUZA, JONATHAN HAHN, TERRI LOOMIS, DONOVAN MINNIS, DARRIN TALL, SHERRI TALL, JAMES BENITT, JOHN SPICER, JUSTIN MELLIOT, PETER VOLKOV, JOY ANN PRANTER, LAWRENCE PRANTER, SCOTT E. MINNIS, PETER R. MULLER, MICHAEL MURRAY, RAY RANDA, and LINDSEY M. JACKSON,

Defendants-Appellees.

LEASE ACCEPTANCE CORPORATION,

Plaintiff-Appellant,

v

No. 278719
Oakland Circuit Court
LC No. 2004-056035-CK

GEMBO BARBOSO,

Defendant,

and

JOSEPH A. CASTRO, SCOTT N. GALECH, MARY MENDOZA, TEDROS MISGUN, LYFORD MORRIS, MARILYN MORRIS, WAN MOUA, LAURA NASATIR, KRISTINE NELSON, CAROL PADILLA, RALPH DARRYL PEREZ, GARY PERKINS, JESUS G. PRIETO, OSCAR RAMOS, DANIEL RANGEL, PAUL RAUCHFUSS, CHRISTEEN REYES, JAMES R. REYES, RAY RIVIERA, SHAWN SABO, DAVID SERRANO, SHAWNEE SPRINGER GENER VALERIO, JERRY WALBERT, ROBERT WILLIAMS, LI PING WONG, BRICE YOUNG, CHARLES ZOETEWEY, MANUEL SMITHERS, DAVIS DENVER III, HENRY P. MYLES, CHAD MARTIN, DAN MICHAELIDES, HAMAYUN ZAHEER, SCOTT RUFFIN, and ALFRED YARINGTON,

Defendants-Appellees.

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Plaintiff, Lease Acceptance Corporation ("LAC"), appeals as of right an order granting defendants' motion for summary disposition and dismissal in this breach of contract action. Because the trial court abused its discretion when it determined that Michigan is not a reasonable, convenient forum to litigate this case, we reverse and remand for trial.

I. Substantive Facts

This case returns to this Court after our previous remand to the circuit court in *Lease Acceptance Corp v Adams*, 272 Mich App 209; 724 NW2d 724 (2006). This Court's previous opinion in this matter summarized the substantive facts of the cases as follows:

> LAC is a Michigan corporation that finances equipment leases. In early 2000, LAC financed the transactions at issue in the present matter. How these transactions came to be is as follows. Defendants responded to advertisements in local California newspapers allegedly recruiting people to perform alarm and satellite television installations. These ads were placed in the papers by a California corporation and Emnet Management Systems, Inc. (Emnet), a company transacting business in California, through an individual named Hans Huo. Huo is not a party to this lawsuit and is incarcerated for charges relating to a fraudulent scheme that was the impetus of the lower court actions.

The advertisements instructed interested persons to call a toll-free telephone number located in San Dims, California, and, subsequently, Coin, California, where employees of Emnet offered free training in alarm and satellite television installations. Defendants were offered a free three-day training seminar in West Coin, California. Emnet agreed to reimburse defendants for travel expenses, lodging, and meals and to make commission payments for recruiting individuals into the installation program.

Huo made misrepresentations to some or all defendants about a scheme to sell computers to defendants and then hire them to use the computers for work. Specifically, victims of Huo's scheme were required to lease a "low end" personal computer, worth less than $1,000, in order to pick up alarm and antenna installation orders from an electronic bulletin board operated by Huo's company. The payments under the lease typically totaled $10,000 to $20,000, and, according to Huo, he concealed from the victims the fact that his company received several thousand dollars from the leasing companies at the time the victims entered into the lease and that his company had no orders for alarm or antenna installation jobs. LAC alleges that it was a victim of Huo's scheme to defraud because "Emnet, in its invoices, made false representations regarding the cost of the equipment being purchased and induced LAC to enter into the leases and pay Emnet for the equipment listed with inflated values."

The terms set forth in the lease provide, in pertinent part:

THIS LEASE IS NON-CANCELABLE FOR THE INITIAL TERM. LESSEE UNDERSTANDS AND AGREES THAT NEITHER SUPPLIER NOR ANY AGENT OF SUPPLIER IS AN AGENT OF LESSOR OR IS AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF THIS LEASE.

* * *

1. ORDERING EQUIPMENT. Lessee hereby requests Lessor to order the Equipment from the Supplier named above, to arrange for delivery to Lessee at Lessee's expense, to pay Supplier for the Equipment after its delivery to Lessee, and to lease the Equipment to Lessee.

* * *

3. DISCLAIMER OF WARRANTIES AND WAIVER OF DEFENSES. LESSOR, NEITHER BEING THE MANUFACTURER, NOR THE SUPPLIER, NOR A DEALER IN THE EQUIPMENT MAKES NO WARRANTY, EXPRESS OR IMPLIED, TO ANYONE AS TO THE FITNESS, MERCHANTABILITY, DESIGN, CONDITION, CAPACITY, PERFORMANCE OR ANY OTHER ASPECT OF THE EQUIPMENT OR ITS MATERIAL OR WORKMANSHIP AND DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR USE OF PURPOSE. LESSOR FURTHER DISCLAIMS ANY LIABILITY FOR LOSS, DAMAGE OR INJURY TO LESSEE OR THIRD PARTIES AS A RESULT OF

ANY DEFECTS, LATENT OR OTHERWISE, IN THE EQUIPMENT WHETHER ARISING FROM THE APPLICATION OF THE LAWS OF STRICT LIABILITY OR OTHERWISE. AS TO LESSOR, LESSEE LEASES THE EQUIPMENT "AS IS". LESSEE HAS SELECTED THE SUPPLIER OF THE EQUIPMENT AND ACKNOWLEDGES THAT LESSOR HAS NOT RECOMMENDED THE SUPPLIER. LESSOR SHALL HAVE NO OBLIGATION TO INSTALL, MAINTAIN, ERECT, TEST, ADJUST OR SERVICE THE EQUIPMENT, ALL OF WHICH LESSEE SHALL PERFORM, OR CAUSE TO BE PERFORMED BY QUALIFIED THIRD PARTIES. IF THE EQUIPMENT IS UNSATISFACTORY FOR ANY REASON, LESSEE SHALL MAKE CLAIM ON ACCOUNT THEREOF SOLELY AGAINST THE SUPPLIER OR MANUFACTURER AND SHALL NEVERTHELESS PAY LESSOR ALL RENT PAYABLE UNDER THE LEASE. LESSEE ACKNOWLEDGES THAT DISSATISFACTION WITH THE EQUIPMENT OR LOSS OF THE EQUIPMENT WILL NOT RELIEVE LESSEE OF ANY OBLIGATION UNDER THIS LEASE, REGARDLESS OF THE CAUSE, LESSEE WILL NOT ASSERT ANY CLAIM WHATSOEVER AGAINST LESSOR FOR LOSS OF ANTICIPATORY PROFITS OR ANY OTHER INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, NOR SHALL LESSOR BE RESPONSIBLE FOR ANY DAMAGES OR COSTS WHICH MAY BE ASSESSED AGAINST LESSEE IN ANY ACTION FOR INFRINGEMENT OF ANY UNITED STATES LETTERS PATENT. LESSOR MAKES NO WARRANTY AS TO THE TREATMENT OF THIS LEASE FOR TAX OR ACCOUNTING PURPOSES.

* * *

16. GOVERNING LAW, JURISDICTION AND CONSENT TO SERVICE OF PROCESS. THIS LEASE SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF MICHIGAN. LESSEE CONSENTS TO THE PERSONAL JURISDICTION OF ANY STATE OR FEDERAL COURT LOCATED IN THE STATE OF MICHIGAN WITH RESPECT TO ANY ACTION ARISING OUT OF THE LEASE OR ANY SCHEDULE. [*Lease Acceptance Corp*, *supra* at 272 Mich App 213-217 (internal footnotes omitted.)]

II. Procedural History

In February 2004, LAC filed four complaints in the circuit court alleging breach of contract for defendants' failure to pay under the terms of the equipment leases at issue. LAC divided the defendants into four separate lawsuits, based on the defendants' general geographic location. All defendants are non-residents of Michigan and instead reside in either: Arizona, California, Colorado, Idaho, Kentucky, Missouri, Nevada, New Mexico, Oregon, Texas, Utah, or Washington. In all four cases, defendants filed motions for summary disposition based on lack of personal jurisdiction. In two of the cases the trial court granted defendants' motion for summary disposition finding a lack of personal jurisdiction, but in the remaining two matters, the

trial court denied defendants' motion finding personal jurisdiction. This Court initially concluded that there was no personal jurisdiction because Michigan was not a reasonably convenient place for the trial. *Lease Acceptance Corp v Adams*, unpublished order of Michigan Court of Appeals, entered October 7, 2004 (Docket No. 255487); *Lease Acceptance Corp v Abell*, unpublished order of Michigan Court of Appeals, entered October 7, 2004 (Docket No. 256582).

Plaintiff then filed an application for leave to appeal with our Supreme Court. Our Supreme Court entered an order directing this Court to "address the appropriate standard of review for determining whether Michigan 'is a reasonably convenient place for the trial of the action' within the meaning of MCL 600.745(2)(b)." *Lease Acceptance Corp v Adams*, 473 Mich 862; 701 NW2d 745 (2005). This Court reviewed the question presented by our Supreme Court in *Lease Acceptance Corp v Adams*, 272 Mich App 209; 724 NW2d 724 (2006) and ultimately remanded the matters back to the trial court to be consolidated and for a determination of whether Michigan is a reasonably convenient forum for the trial by weighing the relevant *Cray* factors as set forth in *Cray v General Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973). On remand, the trial court consolidated the cases as directed by this Court. The trial court then held a hearing wherein it determined that Michigan is not a reasonably convenient forum for trial and dismissed the consolidated cases. This appeal followed.

III. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court has specifically held that the appropriate standard of review for determining whether Michigan is a reasonably convenient forum for a trial within the meaning of MCL 600.745(2)(b) is as follows:

> [A]n abuse of discretion standard applies on appeal from a trial court's decision whether Michigan is a "reasonably convenient" place for trial under MCL 600.745(2)(b). Therefore, as long as the trial court's decision falls within a "principled range of outcomes", the decision on that sub issue must be affirmed. However, the ultimate conclusion under MCL 600.745, i.e., whether personal jurisdiction exists in Michigan under this statute, is reviewed de novo. [*Lease Acceptance Corp v Adams, supra* at 272 Mich App 223 (internal citations omitted.)]

IV. Analysis

In the instant matter, plaintiff raises only one question on appeal, whether the trial court abused its discretion when it dismissed this case holding that Michigan was not a reasonably convenient forum under MCL 600.745 despite each defendant's execution of a commercial lease agreement containing a forum selection clause. Defendants respond that the trial court properly determined that Michigan is not a reasonably convenient forum for this action given the number of defendants who live in the western part of the country and California is the better forum for the action.

In support of its argument plaintiff points to the forum selection clause in the leases signed by each defendant claiming they are sufficient to give the trial court personal jurisdiction

over each defendant. This Court and the United States Supreme Court have held that forum selection clauses are generally valid, as long as they are enforced against a party bound by the contract, and provided they are freely entered and neither unreasonable nor unjust. *Burger King Corp v Rudzewicz,* 471 US 462, 473 n 14; 105 S Ct 2174; 85 L Ed 2d 528 (1985); *Offerdahl v Silverstein,* 224 Mich App 417, 419-420; 569 NW2d 834 (1997). In Michigan, personal jurisdiction can be established by consent subject to certain limitations. MCL 600.701(3) provides that personal jurisdiction can be established by "consent, to the extent authorized by the consent and subject to the limitations provided in section 745." MCL 600.701(3). MCL 600.745 provides in pertinent part:

> (1) As used in this section, "state" means any foreign nation, and any state, district, commonwealth, territory, or insular possession of the United States.
>
> (2) If the parties agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action if all the following occur:
>
> (a) The court has power under the law of this state to entertain the action.
>
> (b) This state is a reasonably convenient place for the trial of the action.
>
> (c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (d) The defendant is served with process as provided by court rules. [MCL 600.745(1) and (2).]

Of specific importance in this matter is MCL 600.745(2)(b) because defendants contend that plaintiff cannot satisfy the requirement that "this state is a reasonably convenient place for the trial of this action" thus plaintiff cannot establish personal jurisdiction over the individual defendants. MCL 600.745(2)(b). Because the statute does not define the phrase "reasonably convenient," this Court, in its previous opinion in this matter, directed the trial court on remand to look to the analogous forum non conveniens body of law for guidance and weigh the *Cray* factors to determine if Michigan is a "reasonably convenient" forum. *Lease Acceptance Corp v Adams, supra* at 272 Mich App 226-228.

The basic principle of forum non conveniens is that a court may resist impositions on its jurisdiction even if that jurisdiction is properly invoked. *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 521; 487 NW2d 475 (1992). After a party moves for dismissal based on forum non conveniens, the court must consider two things: (1) whether this forum is inconvenient; and (2) whether a more appropriate forum exists. *Id*. at 527. If no more appropriate forum exists, the court cannot resist jurisdiction. *Id*. The Michigan Supreme Court articulated criteria to aid a trial court in determining whether to deny jurisdiction on the basis of forum nonconveniens. These criteria are known as the *Cray* factors as set forth in *Cray v General Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973). Under the *Cray* factors, a trial court must consider the plaintiff's choice of forum and "weigh the relative advantages and disadvantages of each

jurisdiction and the ease of and obstacles to a fair trial in this state, considering relevant factors, in deciding whether to dismiss the action." *Id*. at 395.

In the instant case, the trial court, as directed on remand, held a hearing to review the *Cray* factors and how they apply in the context of this case. Our review of the record reveals that the trial court failed to make specific findings regarding all of the individual *Cray* factors but instead took a broader approach ultimately concluding that,

> the *Cray* factor[s] strongly favored the Defendants, and I'm going to grant the motion for summary disposition on this issue. In essence, as I stated all out, the Defendants are located in the western part of the country. Michigan is not only not a reasonable, convenient forum and one of saying a Plaintiff has to bring 392 cases, which is the Plaintiff's main argument, doesn't—doesn't bear any weight or have—really hold water.

In reviewing the trial court's analysis we will address each of the *Cray* factors along with any specific conclusions the trial court made in its analysis regarding the individual *Cray* factors. To be clear, we must not consider these factors to determine whether the forum is "seriously inconvenient" as is required under the forum non conveniens analysis, but rather, use this framework only to aid in the determination of whether Michigan is "reasonably convenient" under MCL 600.745(2)(b).

1. The Private Interest Of The Litigant.

(a) Availability Of Compulsory Process For Attendance Of Unwilling And The Cost Of Obtaining Attendance Of Willing Witnesses

Each party, if the trial were to be held in Michigan or some other forum such as the one suggested by defendants, California, would incur the expense of the attendance of willing witnesses. We conclude that this factor favors neither forum and is thus neutral.

(b) Ease Of Access To Sources Of Proof

The contracts at issue and any other documentation related to the lease processing is in plaintiff's possession in Michigan. On the other hand, any equipment, namely the leased personal computers, is spread out throughout eleven western states presumably with the individual defendants. In this breach of contract action, we envision no scenario where the equipment will need to be viewed or inspected during trial. But the contracts at issue will certainly need to be reviewed during trial. Though, importantly, the contracts and any other relevant documentation can be transported to any convenient forum for litigation purposes. As such, we conclude that this factor is neutral and favors neither forum.

(c) Distance From The Situs Of The Accident Or Incident That Gave Rise To The Litigation

While the individual defendants executed the contacts at issue in California, the impetus for this action is defendants' failure to pay plaintiff in Michigan resulting in the alleged breaches of contract. The parties have not established that either forum is favored under this subsection.

(d) Enforceability Of Any Judgment Obtained

Any judgment obtained in Michigan would be enforceable in California or any of the other ten western states involved. Conversely, any judgment obtained in California would likewise be enforceable. Because neither party has established an enforceability issue, this factor is neutral.

(e) Possible Harassment Of Either Party

The fact of the matter in this case is that there are hundreds of defendants spread out over eleven states. These individual defendants will have to travel from their homes and interrupt their normal daily lives to defend this case no matter in which forum trial is held. Travel to defend a lawsuit is an inconvenience for certain, but defendants have not shown that choosing Michigan over California creates a possibility of harassment of defendants. This factor is neutral.

(f) Other Practical Problems That Contribute To The Ease, Expense, And Expedition Of The Trial

The record shows that defendants have not had a problem obtaining counsel to represent their interests in Michigan throughout this litigation. The procedural history of this case is long and complex and involves a number of appeals. It is obvious that defendants' counsel already has a relationship with the numerous defendants, is more than familiar with the legal system in Michigan, and has served them well in all stages of litigation in this state. As a practical matter, all of the cases have been consolidated in the circuit court in this state for ease of handling. Further, the consolidated cases can be tried in a representative fashion thus expediting resolution and reducing expenses for all parties. Clearly there has already been a considerable investment of resources in pursuing and defending these matters in the Michigan forum. While we could favor the Michigan forum in this subsection, because neither party has established "other practical problems" with litigation in either Michigan or California, we conclude that this factor is neutral.

(g) Possibility Of Viewing The Premises

Unlike a personal injury case where there may be an accident site to be viewed by the factfinder, this is a breach of contract case and as such we find this factor neutral.

2. Matters Of Public Interest

(a) Administrative Difficulties That May Arise In An Area That May Not Be Present In The Area Of Origin

Defendants argue that other than coordinating travel schedules of about 400 individuals, they are not aware of any other administrative difficulties present in or relative to either the Michigan or California forums. Again, being that defendants are spread out among eleven states, travel is a concern no matter whether Michigan or California is selected as the forum for litigation. Under these circumstances we see no more administrative difficulty in coordinating travel to one state versus another state. This factor is neutral.

(b) Consideration Of The State Law That Must Govern The Case

The trial court found that "neither side can show any convenience, as trial courts frequently apply laws from other states. And although the lease agreement names Michigan as the choice of law, [d]efendants assert they will seek to challenge this clause, given their view their agreements were unenforceable. And any, [sic] if they were found to be enforceable, it would be a simple matter for California to apply Michigan law." As the trial court mentioned, the lease agreements contain a choice of law clause that states as follows: "THIS LEASE SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF MICHIGAN." It is undisputed that Michigan's public policy favors the enforcement of contractual choice of law provisions. See *Offerdahl, supra* at 419. While the trial court suggests that defendants may, at some point in the future, challenge the choice of law provision in the leases, we cannot award this mere possibility more weight than a choice of law clause already present in the executed contracts. And, while it may be a "simple matter for California to apply Michigan law" as the trial court stated, we cannot ignore the obvious fact that it would be significantly simpler for Michigan Courts to apply Michigan law. Thus, we conclude that the trial court abused its discretion on this factor and conclude that this factor favors Michigan as a forum.

(c) People Who Are Concerned With The Proceeding

The trial court credited defendants' argument that "numerous litigants and their families . . . have been devastated by this ordeal" and would rather litigate this claim in California. Though the record reveals that both parties suffered damages at the hands of the criminal enterprise created by Hans Huo, the trial court here did not similarly recognize plaintiff's assertion that it is a Michigan corporation that suffered significant damages as a result of the alleged nonpayment of hundreds of leases signed by defendants and would rather litigate in Michigan. Bearing in mind these competing concerns, we conclude that this factor does not favor either forum.

3. Reasonable Promptness In Raising The Plea Of Forum Non Conveniens

The record reveals that defendants raised arguments regarding personal jurisdiction in a timely manner, thus this factor is neutral.

In sum, our review of the *Cray* factors reveals that the private interests of the litigants are neutral and the public interest factors favor plaintiff. After completing this exercise, we conclude that all but one factor is neutral and favor neither forum. While the trial court's analysis of the *Cray* factors was done with a broad brush, we have analyzed each factor separately and provide our reasoning supporting our conclusion. Unlike the trial court's general conclusions based almost solely on the fact that defendants live in the western part of the United States, we have endeavored to weigh each factor on its own merit. The lone factor that we conclude favors Michigan is the choice of law factor. Thus, under the *Cray* framework, Michigan would be the favored forum.

Again, generally, forum selection clauses are valid, as long as they are enforced against a party bound by the contract, and provided they are freely entered and neither unreasonable nor unjust. *Burger King Corp, supra* at 473 n 14; *Offerdahl, supra* at 419-420. In Michigan, a party

seeking to avoid enforcement of a forum selection clause bears a "heavy burden" of showing that the clause should not be enforced. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 348; 725 NW2d 684 (2006). As this Court has previously stated:

> [w]here the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided. [*Id*. at 350.]

Considering the fact that the parties in this case agreed to Michigan as a forum by contract, any inconvenience "should have been apparent to [defendants] when . . . [they] agreed to the forum-selection clause." *Id*. at 350. Prevailing on none of the *Cray* factors, defendants have not established that the negotiated forum, Michigan, is not a "reasonably convenient" forum for litigation. Therefore, defendants are precluded from challenging the forum selection clause based on the purported inconvenience of the negotiated location.

Under the circumstances, we conclude that the trial court abused its discretion by granting the motion for summary disposition and dismissing the matter based on its determination that Michigan is not a "reasonably convenient" forum to litigate this case.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood